82-958

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

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McDONOUGH POWER EQUIPMENT, INC.,

Petitioner,

vs.

BILLY G. GREENWOOD, a minor child, by his parents and natural guardians, JOHN G. GREENWOOD and FREDA GREENWOOD, JOHN G. GREENWOOD, individually; and FREDA GREENWOOD, individually,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The petitioner, McDonough Power Equipment Company, Inc.,* respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 3, 1982 on the following issues:

1. Whether the Court of Appeals erred in setting aside a jury verdict without any finding of error by the trial court, and without any evidence in the record of juror misconduct resulting in bias and prejudice to the appellant.

2. Whether the Court of Appeals erred in ordering a new trial and refusing to remand the case to the district court for determination of facts relevant to the grounds for a new trial.

PARTIES

*Since the trial of this case, Petitioner's corporate identity has changed. Petitioner is now the Snapper Power Equipment Division of Fuqua Industries, Inc., a Delaware corporation.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals is reproduced in the appendix at A-1. The opinion is reported at 687 F.2d 338. The order of the Court of Appeals denying petitioner's motion for rehearing is reproduced in the appendix at A-13.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 3, 1982. A timely petition for rehearing was filed on September 14, 1982. The petition for rehearing was denied on October 4, 1982. This petition has been filed within sixty (60) days subsequent to the denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) (1976).

I. STATEMENT OF THE CASE

This is a personal injury products liability action involving an allegedly defective riding lawnmower. The three year old plaintiff was injured while playing with other children in a neighbor's yard, without parental supervision. The neighbor's twelve year old son was operating a riding lawnmower manufactured by defendant McDonough Power Equipment Company, Inc. at the time of the accident, likewise without parental supervision. Plaintiff's nine year old brother was seated on the operator's lap at the time of the accident.

Subject matter jurisdiction was based upon diversity of citizenship pursuant to 28 U.S.C. Section 1332. The case was tried in the U.S. District Court for the District of Kansas, sitting at Topeka, between April 4 and April 25, 1980. The jury returned a special verdict in accordance with the substantive law of the State of Kansas, where the accident occurred. The jury found no liability for the defendant manufacturer. The jury also found plaintiff's damages in the amount of $375,000.00.

In accordance with the special verdict, the Court entered judgment in favor of the defendant manufacturer. Plaintiff filed a timely motion for new trial, alleging eighteen grounds. The eighteenth ground alleged involved the Court's refusal to permit interrogation of the jurors by plaintiff's counsel, who sought to obtain evidence of juror misconduct. The remaining grounds involved issues that had previously been ruled upon by the Court. Plaintiff's motion for a new trial was ultimately denied, and plaintiff appealed.

The U.S. Court of Appeals for the Tenth Circuit ordered a new trial, based upon the alleged misconduct of juror Ronald Payton. Payton allegedly failed to reveal significant information requested by plaintiff's counsel during voir dire. Defendant denied that Payton had failed to reveal significant information, and further denied that plaintiff had made any showing to the Court that Payton or any other juror was biased. The Court of Appeals held that plaintiff's allegations were sufficient to require a new trial.

The trial judge never held that juror Payton had concealed significant information, or that he was biased or prejudice. The Court of Appeals did not hold that the trial judge abused his discretion in denying the motion for a new trial. The Court of Appeals made a de novo determination on the question of juror misconduct, based on allegations that had never been substantiated at the trial level. The Court of Appeals held that comments made by juror Payton during a discussion with counsel subsequent to trial supported the contention of misconduct. The contents of this conversation were never reported to the trial judge, and were never made a part of the district court record. Plaintiff's counsel had been

granted permission to approach juror Payton for the purpose of obtaining support for his motion for a new trial. Because the results of the interview were not reported to the trial judge, that information had no influence on the decision to deny the motion.

The specific act of misconduct alleged was the failure of juror Payton to respond to a question asked by plaintiff's counsel:

> Now, now many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain or suffering, that is you or any members of your immediate family?

After the trial, plaintiff's father submitted an affidavit alleging that juror Payton's son had suffered a broken leg caused by the accidental separation of a truck wheel. The trial judge granted leave to contact Mr. Payton and questioned him concerning the allegations. The trial judge described his understanding of the issue to be resolved in the following terms:

> Counsel should be informed that the Court's review of the court reporter's notes of voir dire indicates that plaintiff's counsel's question should have elicited a response from the juror only if (1) his son was in an accident as alleged and (2) the son sustained a disability or suffered prolonged pain.

> Frankly, the Court is not overly impressed with the significance of this particular situation. It would seem that a juror whose son had been injured in a products liability setting would be the type of juror that plaintiff would be looking for in this type of case. We note that at least one other juror who responded affirmatively to this particular area of questioning was not the subject of a peremptory challenge from either side.

Permission to interview juror Payton was granted on May 5, 1980. Payton was interviewed by telephone the same day.

Payton confirmed that his son had suffered a broken leg under the circumstances alleged, but explained that no disability or prolonged pain had resulted. Plaintiff's counsel made no arrangements either to tape the interview or to have a stenographic transcript made. When the results of the interview were ultimately described in appellate briefs, each counsel relied upon his own telephone notes and personal recollection of the interview. Needless to say, counsel's versions of the information imparted by Mr. Payton differed significantly. Counsel for defendant's recollection of the interview was that Payton confirmed the truthfulness and completeness of his answers during voir dire.

Two of the three members of the Court of Appeals panel considered plaintiff's counsel's report of the interview sufficient grounds to order a new trial of the entire case. The third member of the panel dissented, arguing that the most plaintiff was entitled to was a hearing before the district court judge for the purpose of

making factual determinations on the allegations of misconduct. This panel member also voted to grant defendant's motion for rehearing and submit the appeal to the Tenth Circuit.

II. REASONS FOR GRANTING THE PETITION

1. The Court of Appeals has so far Departed from the Usual and Accepted Course of Judicial Proceedings that this Court Must Exercise its Powers of Supervision.

The Court of Appeals held that the district court's judgment based on a jury verdict should be reversed, and a new trial should be ordered, based upon allegations that a juror had failed to respond to a question on voir dire. Counsel for plaintiff contended that the juror's omission deprived him of the exercise of his right of peremptory challenge. The trial judge denied a motion for new trial based in part upon this allegation. At the time the motion for new trial was denied, no evidence had been presented to indicate that any juror had failed to respond accurately and truthfully to every question asked during voir dire.

On appeal, counsel for plaintiff presented arguments based on facts never presented to the trial court. Juror Payton was alleged to have made comments during a telephone conversation with counsel which were alleged to give some indication of partiality. The Court of Appeals held that this conversation did present evidence of partiality, and ordered a new trial on that basis. At no point did the Court of Appeals hold that the district judge abused his discretion in denying the motion for new trial on the record

presented to him. Neither did the Court of Appeals hold that the trial judge committed any other error. The Court of Appeals treated the plaintiff's appeal brief as a renewed motion for a new trial, and determined that motion de novo based on the unsupported allegations contained in the briefs.

The Court of Appeals failed to follow the rule of law stated in its own opinion, as was pointed out by the dissenting member of the panel. The case was decided upon the principles of law set forth in Photostat Corporation v. Ball, 338 F.2d 783 (10th Cir. 1964), which were stated in the following terms:

> Under Photostat, the failure of a juror to fully and truthfully answer questions propounded to the panel is deemed reversible error upon a showing of probable bias of the juror with consequential prejudice to the unsuccessful litigant. The withholding of insignificant or trifling information indicative of only a remote or speculative influence on the jurors not being prejudicial. A new trial is required, however, if the suppressed information is of 'sufficient cogency and significance' to cause us to believe that counsel was entitled to know of it when he came to exercise his right of peremptory challenge. (Appendix A-8, A-9).

Under this test, the party alleging juror misconduct must prove (1) the juror has failed to fully and truthfully answer a question, (2) the juror is biased against the complaining party, (3) the bias of the juror resulted in prejudice during the jury's deliberations.

The trial court found none of the three factors to be supported by any evidence. The opinion of the Court of Appeals baldly states that the facts relied upon by it in determining these factors nowhere appear in the trial record. See Appendix A-6, A-7. As the dissenting opinion of Justice Barrett points out, neither the record nor arguments of counsel supports any finding that the juror was biased against the plaintiff, or that his alleged bias in any way influenced the jury's verdict. The dissenting opinion correctly points out that the most that could be found, even from the allegations in plaintiff's brief, was that the juror failed to answer a question fully.

Plaintiff wholly failed to present to the district court any basis to warrant the granting of a new trial. Even the contentions made on appeal were insufficient to support the granting of a new trial. Neither at the district court level nor in the Court of Appeals was any evidence, or any argument, presented to show how juror Payton could have been biased against the plaintiff, or how his alleged bias could have worked to the prejudice of the plaintiff. Under these circumstances, the Court of Appeals unquestionably abused its discretion in ordering a new trial.

Only the Supreme Court of the United States can maintain discipline over the various Circuit Courts of Appeal. Where a Circuit Court of Appeals oversteps its authority, and usurps the authority of the district court rather than exercising review over that court, this Court is required to exercise its powers of supervision. The decision rendered by the Court of Appeals in this Court is without parallel in any other reported decision. The defendant was entitled to a trial by jury under the provisions of the

Seventh Amendment to the United States Constitution. If the Courts of Appeal are permitted to grant arbitrary indulgences to selected appellants, outside the boundaries of accepted principles of appellate review, jury verdicts will be rendered meaningless. The opportunity for abuse of discretion is vast. If a Court of Appeals were permitted to grant new trials on behalf of favorite appellants without regard to principles of law, and to deny new trials where the verdict favors the party in sympathy, the legal process would be reduced to a game of chance.

The decision in the present case need only be compared with its mirror-image opposite to illustrate the potential for abuse. This Court was recently asked to review the decision of the U.S. Court of Appeals for the Fourth Circuit in Michelin Tire Corporation, et al. v. Fallaw, (4th Cir. unpublished) Petition No. 82-266 in the October term, 1982 of this Court. In that case, a judgment in favor of plaintiffs was entered on a jury verdict at the trial level. Defendants requested a new trial based on allegations that jurors had failed to respond fully and truthfully to questions during voir dire. The trial court held a hearing, and determined that the jurors' omissions were innocent, indicated no bias, and resulted in no prejudice. The Court of Appeals affirmed the trial court's exercise of its inherent discretion. This Court declined to exercise its jurisdiction on petition for certiorari.

The present case is distinguishable from the Fallaw case only on points that are favorable to this petitioner. If this petition is denied, lower courts will be free to render totally opposed decisions on indistinguishable fact

situations. The rules of law were adhered to, and due process followed, in the Fallaw case, as this Court recognized. Yet the exact same rules of law have ostensibly been applied in the present case, with a result which bears no resemblance to that of Fallaw.

A recent decision of the Supreme Court of California further illustrates the temptations confronting appellate courts with unnecessarily broad discretion in granting or denying new trials. In Hasson v. Ford Motor Company, 185 Cal.Rptr 654 (1982), the defendant appealed an adverse verdict in the second trial of the same case. An earlier appeal by Ford resulted in the new trial. The Supreme Court of California admitted that serious juror misconduct occurred during the second trial, but refused to grant a new trial for basic reasons of "equity":

> This plaintiff was seriously and permanently injured in 1970. He has prevailed in two lengthy jury trials, but for twelve years has received no recovery. Justice will not be served by a second reversal, yet another lengthy trial, to be followed in all likelihood by further appeals. 185 Cal.Rptr. at 673.

The United States Courts of Appeal certainly are no less prone to human sentiments than the California Supreme Court. If the Courts of Appeal are permitted to "bend" the rules of appellate review to grant new trials to sympathetic parties, and deny new trials where the result would be unfavorable to a sympathetic party, that ability will undoubtedly be used at some time or other. Every party is, however, entitled to equal protection of the law, including the right to a

judgment in accordance with a jury's verdict rendered after a fair trial. Even a single instance of "bending" the rules is too many. This Court should therefore intervene to reimpose the discipline of law in the present case.

2. There is a Conflict Among Circuits Concerning the Standard for Granting a New Trial Based on Allegations of Juror Misconduct During Voir Dire.

The Court of Appeals applied a standard for determining juror misconduct which is drastically at variance with the standard applied by every other circuit which has addressed the issue. The Court of Appeals found juror misconduct, as a matter of law, based solely upon an allegation that a juror failed to reveal information during voir dire which might have been material to the exercise of peremptory challenges by plaintiff's counsel. The Court of Appeals required no showing of juror bias, or resulting prejudice to the plaintiff. The Court of Appeals further rejected the defendant's contention that the record affirmatively showed the information allegedly withheld to be immaterial, based on the conduct of plaintiff's counsel. The Court of Appeals therefore engaged in an irrebutable presumption that even an innocent failure to reveal potentially material information on the part of a juror requires a new trial.

Every other circuit Court of Appeals which has addressed this question has determined that the complaining party must affirmatively show not only a significant omission by the juror, but also must show juror bias against the complaining party and actual prejudice during jury deliberations, in

order to require a new trial. See, for example, Vezina v. Theriot Marine Service, Inc., 554 F.2d 654, after remand 610 F.2d 251 (5th Cir. 1980); Martinez v. Food City, Inc., 658 F.2d 369 (5th Cir. 1981); McCoy v. Goldstein, 652 F.2d 654 (6th Cir. 1981); Christian v. Hertz Corporation, 313 F.2d 174 (7th Cir. 1963); Hathorn v. Trine, 592 F.2d 463 (8th Cir. 1979); Johnson v. Hill, 274 F.2d 110 (8th Cir. 1960).

The ruling embodied in these cases is eminently sensible. A new trial should not be ordered if the juror was never asked to reveal the information that allegedly would have resulted in his peremptory challenge. Some showing that the juror has withheld information sought by counsel is therefore reasonable and necessary. The requirements of a showing of bias and prejudice are mandated by F.R.C.P. 61, relating to harmless error. If the juror's failure to disclose information is evidence of a bias in favor of the complaining party, obviously no new trial should be granted. Similarly, if the bias of the juror has no effect whatever on the outcome of the jury's deliberations, a new trial should not be granted. These factors were considered in the dissenting opinion of Justice Barrett in the present case, who pointed out that the only alleged bias would have gone to the amount of plaintiff's damages, rather than the defendant's liability.

The refusal of the Court of Appeals to examine the manner in which plaintiff's counsel used peremptory challenges at trial is contrary both to good sense and to the practice in other circuits. Two jurors revealed information about themselves of the same kind and quality as that allegedly withheld by juror Payton. Neither juror was challenged. There can be no better evidence

that the information allegedly withheld by juror Payton was immaterial to the issues to be tried. If the information was immaterial, Payton's failure to reveal it and the Court's refusal to order a new trial are harmless. The manner in which counsel has in fact exercised peremptory challeges is considered relevant in the Eighth Circuit. In McCoy v. Goldstein, supra, it was held that if plaintiff had shown sufficient grounds for an evidentiary hearing on alleged deprivation of the right of peremptory challenge, based in part upon the fact that plaintiff's counsel had challenged a juror who revealed facts similar to those withheld by another juror. See 652 F.2d at 659. If a motion for new trial based on juror misconduct during voir dire can be supported by counsel's conduct in exercising peremptory challenges, certainly basic due process requires that same information be taken into consideration when the movant's allegations are rebutted rather than supported.

Counsel for the petitioner hesitates to interject information from outside the record into this Petition, but feels that this course is necessary to convince the Court of the equity of its position. Subsequent to the refusal of the Court of Appeals to renear this case, counsel for plaintiff stated to counsel for petitioner that he never had any intention of challenging juror Payton, and would not have challenged him even if all of his post-trial disclosures were known at the time the jury was selected. Counsel for plaintiff related that he knew juror Payton to be employed as a butcher in the city of Emporia, Kansas. Counsel for plaintiff stated that he assumed juror Payton would have some awareness that counsel for plaintiff had represented the Butcher's Union Local for the City of Emporia, and would therefore tend to favor the plaintiff in

this case. Counsel for plaintiff stated that he knowingly and intentionally limited his examination of juror Payton, to avoid revealing this information to counsel for petitioner and thereby risking the exclusion of juror Payton. Because this information was not revealed to counsel until after the motion for rehearing was denied, it has not previously been submitted to any court. This information is submitted to this Court reluctantly, in the hope that it will move the Court to a realization of the injustice committed in the present case, and the arbitrary results which can be achieved if the procedures followed by the Court of Appeals are allowed to stand unchallenged.

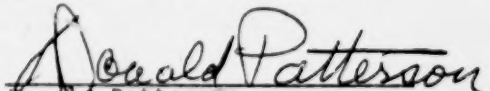
Every circuit except the Tenth Circuit requires a positive showing to the trial court of all three elements of juror misconduct, if a new trial is to be obtained. Only the Tenth Circuit refuses to permit the trial court to exercise its discretion and to make findings of fact. Only the Tenth Circuit requires a new trial where the complaining party has not been prejudiced. Only the Tenth Circuit refuses to consider facts in the record in determining the extent to which the rights of the complaining party may have been prejudiced. The proper remedy in this case is that provided by the majority of the circuits, and recommended by the dissenting Justice in the Court of Appeals. The decision of the trial court should either be affirmed, or the case should be remanded for the limited purpose of a hearing to inquire about the alleged misconduct of juror Payton, and a determination by the trial court of the existence of any bias on Payton's part. The trial court, in the event of a remand, should be entitled to view all of the facts relevant to plaintiff's claim of deprivation of his right to a fair trial. The trial court should be permitted

to consider the conduct of counsel on the record, and counsel's public pronouncements, in determining whether plaintiff was deprived of a right to a trial by jury.

III. CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

Respectfully submitted,



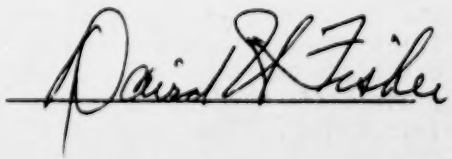
Donald Patterson

Steve R. Fabert
Counsel for Petitioner

IV. CERTIFICATE OF SERVICE

I, the undersigned, certify that I deposited three copies of the foregoing in the United States mail, postage prepaid, on the 1st day of December, 1982, addressed as follows:

Gene E. Schroer and Dan L. Wulz, JONES, SCHROER, RICE, BRYAN & LYKINS, 115 E. 7th, Topeka, Kansas 66603.



APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BILLY G. GREENWOOD, et al.,

Plaintiffs-Appellants,

v.

McDONOUGH POWER EQUIPMENT, INC.,

Defendant-Appellee.

No. 80-1698

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. Civil 77-4087)

Dan L. Wulz (Gene E. Schroer with him on the brief) of Jones, Schroer, Rice, Bryan & Lykins, Topeka, Kansas, for Plaintiffs-Appellants.

Donald Patterson (Steve R. Fabert with him on the brief) of Fisher, Patterson, Sayler & Smith, Topeka, Kansas, for Defendant-Appellee.

Before BARRETT and McKAY, Circuit Judges, and BRIMMER, District Judge.*

McKAY, Circuit Judge.

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*Chief Judge of the United States District Court for the District of Wyoming, sitting by designation.

Billy G. Greenwood and his parents, John and Freda Greenwood, appeal from an adverse jury verdict and related judgment in a products liability action predicated upon strict liability. Jurisdiction rests upon diversity of citizenship. The facts will be discussed only insofar as relevant for purposes of our decision.

On May 25, 1976, Jeff Morris, thirteen years of age, was mowing the Morris yard on a riding mower manufactured by appellee, McDonough Power Equipment, Inc., pursuant to his father's instructions. Jeff had previously operated the mower approximately thirty hours over a three- to four-year period.

On this particular day, Troy Greenwood, Billy's older brother, was riding on the mower with Jeff. The Morrises and Greenwoods were next-door neighbors. While operating the mower, Jeff watched the left front wheel to make certain that he was getting an even cut. Jeff was aware that Billy, two years of age, and several other children, were playing at and around a swingset in the back yard, approximately 25 feet from the area where he was mowing.

While Jeff was mowing the yard, Billy, undetected by Jeff, approached the mower to pick up a doll in the path of the mower. Immediately prior to the accident, Jeff, upon realizing that Billy was in the path of the mower, shouted "watch out." Fearing that he could not stop in time, Jeff turned the mower to the right to avoid hitting Billy. During the course of the turn, the left front tire of the mower went over Billy's left foot. Billy subsequently kicked

at the mower with his right foot but both feet went under the mower where they contacted the mower blade, resulting in the loss of both feet.

At the time of the accident, Freda Greenwood was in her home doing housework. Although she was aware that Troy and Billy were playing in the Morris yard, she was unaware that Jeff was mowing the yard until Troy notified her of the accident.

In their complaint, the Greenwoods alleged that: the mower was of defective design and workmanship, and negligently constructed; the defects of the mower were hidden and latent and could not be discovered by general observation or superficial examination; the defects were due to McDonough's negligence; the mower was not fit for its intended purpose; Billy sustained permanent disability; and that they, as Billy's parents, sustained severe emotional shock and damages.

In its answer, McDonough denied that the mower was negligently or improperly designed or that it was unfit for its intended use. McDonough also alleged that Billy's injuries were caused by the combined negligence of Ira Morris (Jeff's father), as the owner of the mower, Jeff Morris, as the operator of the mower, and John and Freda Greenwood, as the persons responsible for Billy's supervision.

Following several pretrial motions, the case proceeded to trial on the basis of strict liability. The Greenwoods alleged that the mower was defective in that: the blade was below the deck of the

mower; the blade bar, as manufactured, was not within McDonough's manufacturing tolerances thus causing the blade level to be below the deck, aggravating the injury to the left foot; the blade was improperly designed; the blade brake-clutch was defectively designe because it did not provide a deadman control for stopping, and because of its lack of durability.

The trial extended over a three-week period. McDonough's defense throughout trial was that the mower was not defectively designed and that the combined negligence of the Morrises and Greenwoods gave rise to the accident and consequent injuries sustained by Billy. The jury, in accordance with Kansas law, was allowed to compare the fault of McDonough, Jeff Morris, Ira Morris, and Freda Greenwood. See Kan. Stat. Ann. § 60-258a (1976). The jury returned a verdict finding McDonough 0% at fault, Jeff Morris 20% at fault, Ira Morris 45% at fault, and Freda Greenwood 35% at fault. The jury assessed damages at $0.00. Upon being instructed by the trial court that, inasmuch as Billy had lost both feet he had definitely suffered some damages, the jury reconvened for further deliberations and found that Billy had been damaged in the amount of $375,000.00. The district court thereafter entered judgment that Billy take nothing, that the action be dismissed on the merits, and that McDonough recover its costs.

The Greenwoods contend the district court erred in denying their motion to approach the jurors and in denying leave to subpoena the jurors to give testimony at the hearing on their motion for a

new trial. They also contend they are entitled to a new trial because their right to peremptory challenge was impaired.

The judgment in favor of McDonough was entered on April 25, 1980. On April 29, 1980, the Greenwoods filed a motion to approach the jurors contending that "plaintiffs are of recent information and belief that the jury foreman's, Mr. Payton, son may have been injured at one time, which fact Mr. Payton did not state in response to juror voir dire questions." Record, vol. 2, at 325.

The Greenwoods' attorney, in his voir dire, had asked the prospective jurors:

> Now, how many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain or suffering, that is you or any members of your immediate family?

Record, vol. 21, at 39. One juror answered affirmatively, and after additional questioning by Greenwoods' attorney as to his impartiality, was allowed to remain on the jury. Mr. Payton did not respond.

On April 30, 1980, the district court entered a memorandum and order denying the Greenwoods' motion to approach the jurors. The district court summarized its denial of the motion by observing that interviews of jurors by persons connected with a case are not favored except in extreme situations, citing Stein v. New York, 346 U.S. 156 (1953), and McDonald v. Pless, 238 U.S. 264 (1915). The district court also adopted, by appending, Silkwood v. Kerr-McGee

Corp., 485 F. Supp. 566 (W.D. Okl. 1979), declaring it "controlling here."

On May 1, 1980, the Greenwoods filed a second motion to approach the jurors which states:

> Counsel for plaintiff shows to the court that to our best recollection and belief, Juror Payton did not answer counsel's question in the affirmative as to whether he or any member of his immediate family had ever been seriously injured. The Affidavit of John G. Greenwood attached affirms that Juror Payton's son was seriously injured in a truck tire explosion. Had voir dire questions been answered truthfully, further examination may have revealed grounds to challenge Juror Payton for cause, or affected counsel's decisions with respect to peremptory challenges.

Record, vol. 2, at 345. On May 5, 1980, the district court entered an order granting, in part, the Greenwoods' second motion:

> Upon due consideration, but cognizant of the parties' need for a speedy ruling, the Court, in an abundance of caution, has determined to grant the motion in a limited degree. The motion will be generally overruled with the exception that counsel for plaintiff will be allowed to inquire of juror Ronald Payton regarding alleged injuries sustained by his son from the explosion of a truck tire.
>
> The inquiry should, of course, be brief and polite. Defense counsel must be present. The witness should not be unnecessarily inconvenienced. The inquiry should be undertaken telephonically or at a place convenient to the juror. The juror should not be summoned to Topeka solely for this purpose.
>
> Counsel should be informed that the Court's review of the court reporter's notes of voir dire indicates that plaintiff's counsel's question should have elicited a response from the juror only if (1) his son was in an accident as alleged and (2) the son sustained a disability or suffered prolonged pain.

Record, vol. 2, at 348.

Counsel for both parties subsequently arranged for a conference call interview with juror Payton. During the course of the

interview, which was not preserved as part of the record herein, juror Payton related that his son had received a broken leg as the result of an exploding tire. According to counsel for the Greenwoods, Payton related that "it did not make any difference whether his son had been in an accident and was seriously injured," "that having accidents are a part of life," and that "all his children have been involved in accidents." Appellants' Brief at 7. According to McDonough's counsel, Payton "did not regard [his son's broken leg] as a 'severe' injury and as he understood the question [the injury] did not result in any 'disability or prolonged pain and suffering'. As far as Mr. Payton is concerned he answered counsel's question honestly, and correctly, by remaining silent." Appellee's Brief at 18.

Both parties cite Photostat Corp. v. Ball, 338 F.2d 783 (10th Cir. 1964), in support of their respective positions that Mr. Payton's failure to disclose his son's accident during voir dire did, or did not, prejudice the Greenwoods' right of peremptory challenge.

In Photostat we held that when four prospective jurors in a negligence case arising out of an automobile accident withheld information as to their personal involvement in accidents with resulting claims, for which they were paid, a defendant was entitled to a new trial because of the prejudice to his right of peremptory challenge, even assuming that the jurors had good intentions and were not disqualified for cause. In Photostat we observed:

> In Consolidated Gas and Equipment Company of America v. Carver, 10 Cir., 257 F.2d 111, we recognized the burden on the complaining litigant in a post-verdict hearing to show that failure of a juror to fully and truthfully answer questions propounded to the panel concerning his experience in similar litigation resulted in prejudice to his cause. We embraced the settled rule which moves the court to act only upon a showing of probable bias of the juror with consequent prejudice to the unsuccessful litigant. Courts act on probabilities, not possibilities, and if the suppressed information is so "insignificant or trifling" as to indicate only a remote or speculative influence on the juror, the right of peremptory challenge has not been affected. See also Crutcher v. Hicks (Ky.), 257 S.W.2d 539, 38 A.L.R. 2d 620.
>
> The prospective juror in Consolidated Gas and Equipment Company of America v. Carver, supra, was then a plaintiff in a state court suit for actual and exemplary damages. And, the suit in which he was a plaintiff and the one in which he was a prospective juror "bore marks of similarity". In these circumstances we were of the view that if the juror had disclosed the pendency of his action in the state court, he would have been excused for cause, and if not for cause, the defendant would have exercised one of his peremptory challenges; that "[w]hether so intended or not, the effect of the silence of the juror was to deceive and mislead the court and the litigants in respect to his competency. And such deception and misleading had the effect of nullifying the right of peremptory challenge as completely as though the court had wrongfully denied such right." Id. p. 115.
>
> In this post-mortem inquiry, we cannot know of course what counsel would have done with the suppressed information. Nor can we take his post-mortem word for it. But we need not presume to speculate on the judgment he would have made. It is enough, we think, to show probable bias of the jurors and prejudice to the unsuccessful litigant if the suppressed information was of sufficient cogency and significance to cause us to believe that counsel was entitled to know of it when he came to exercise his right of peremptory challenge. If so, the suppression was a prejudicial impairment of his right.

338 F.2d at 786-87 (emphasis added).

Under Photostat, the failure of a juror to fully and truthfully answer questions propounded to the panel is deemed reversible error upon a showing of probable bias of the juror with consequential

prejudice to the unsuccessful litigant. The withholding of insignificant or trifling information indicative of only a remote or speculative influence on the juror is not deemed prejudicial. A new trial is required, however, if the suppressed information is of "sufficient cogency and significance" to cause us to believe that counsel was entitled to know of it when he came to exercise his right of peremptory challenge. Id. at 787.

Applying these standards, we hold that juror Payton's failure to answer the question posed on voir dire prejudiced the Greenwoods' right to peremptory challenge, thus necessitating a new trial. We think the unrevealed information was of "sufficient cogency and significance" that the Greenwoods' counsel was entitled to know of it in deciding how to use his peremptory challenges.[1] The test is an objective one: the fact that the juror failed to disclose

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1. McDonough argues that Mr. Payton probably would not have been peremptorily challenged and therefore plaintiffs were not prejudiced. It bases this contention on the fact that two other prospective jurors responded that members of their family had been injured, and after further questioning by plaintiffs' counsel, were allowed to remain on the jury. We agree with plaintiffs that this argument has no merit, since "[t]he test is whether counsel was entitled to know the suppressed information, not whether counsel might have, would have, or probably would have acted on the information." Appellants' Reply Brief at 12; see Photostat Corp. v. Ball, 338 F.2d 783, 787 (10th Cir. 1964). An inquiry based on whether counsel would have challenged the juror would be unworkable. Not every suspicious answer to a voir dire question leads to a peremptory challenge. Rather, counsel must exercise his intuitive judgment about the prospective juror based not only on what the juror says but also on non-verbal cues indicative of the juror's mental attitude toward the merits of the case and the parties. This opportunity to judge the character and attitudes of the prospective juror may persuade counsel that the juror is capable of fairly and impartially deciding the client's cause despite the giving of an answer indicative of possible bias. It is the opportunity to assess the prospective juror that is important, not whether the juror ultimately is challenged as a result of the opportunity.

important information unintentionally, or as a result of a misunderstanding of the voir dire question, does not foreclose the conclusion that the right to peremptory challenge was substantially impaired. Id. at 785, 787. The unrevealed information indicated probable bias of juror Payton because it revealed a particularly narrow concept of what constitutes a serious injury. The prejudice to the Greenwoods was exacerbated by the fact that Mr. Payton became the jury foreman. We accept as true that Mr. Payton did not intentionally conceal the information and held a good-faith belief that his son's injury was not a serious one resulting in disability or prolonged pain and suffering. Good faith, however, is irrelevant to our inquiry. Id. at 785. If an average prospective juror would have disclosed the information, and that information would have been significant and cogent evidence of the juror's probable bias, a new trial is required to rectify the failure to disclose it. These conditions were met here.

We therefore reverse and remand this case to afford plaintiffs the opportunity to select a new jury and present their evidence in a new trial.[2/]

REVERSED AND REMANDED.

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2. We emphasize that plaintiffs' cause of action is not a groundless one. The district court found plaintiffs' evidence sufficiently substantial to justify submission of their theory of liability to the jury. We are therefore satisfied that our remand for a new trial is not an exercise in futility.

No. 80-1698 - BILLY G. GREENWOOD, et al. v. McDONOUGH POWER EQUIPMENT, INC.

BARRETT, Circuit Judge, dissenting:

I respectfully disagree with the majority's view that juror Payton's failure to disclose his son's accident during voir dire prejudiced Greenwood's right of peremptory challenge under our Photostat Corp. v. Bill.

The record does not indicate that juror Payton, by his silence, improperly answered the court's voir dire query as to whether he or any member of his family had sustained any injuries resulting in any disability or prolonged pain or suffering. Payton simply did not consider his son's broken leg received as the result of an exploding tire, to be an injury resulting in disability or prolonged pain and suffering. He so stated during the post-trial telephone interview. That statement, in my view, does not imply that Payton believed that Billy's injuries did not give rise to a disability or prolonged pain and suffering.

Payton's expressed belief that his son's broken leg did not result in a disability or prolonged pain and suffering must be considered in the context of risks that a parent recognizes in the everyday life of growing children. It does not establish probable bias with consequential prejudice to the Greenwoods. This conclusion is justified, I believe, in light of the unanimous jury assessment of Billy's damages in amount of $375,000.00.

If juror Payton had been prejudiced against Billy's injuries to the extent indicated, it is inconceivable that he would have joined in assessing Billy's damages at $375,000.00. Thus, I would hold that there has been no showing of probable bias by juror Payton with consequent prejudice to Billy.

In lieu of complete reversal, I suggest that a partial remand to the trial court with instruction to conduct an evidentiary hearing into the issue of Payton's possible bias and prejudice is the proper course to be followed.

SEPTEMBER TERM - October 4, 1982

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Clarence A. Brimmer, Jr., District Judge*

BILLY G. GREENWOOD, a minor child, by his parents and natural guardians, JOHN G. GREENWOOD and FREDA GREENWOOD; JOHN G. GREENWOOD, individually; and FREDA GREENWOOD, individually,	)	
Plaintiffs-Appellants,	)	No. 80-1698
v.	)	
McDONOUGH POWER EQUIPMENT, INC.,	)	
Defendant-Appellee.	)	

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted. Judge Barrett voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

By 
Robert L. Hoecker
Chief Deputy Clerk

* Of the United States District Court for the District of Wyoming, sitting by designation.